

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HPEV, INC., a Nevada corporation,

Plaintiff

v.

SPIRIT BEAR LIMITED, a Delaware corporation,

Defendant.

Case No. 2:13-cv-01548-JAD-GWF

SPIRIT BEAR LIMITED, a Delaware corporation,
on behalf of HPEV, INC., a Nevada corporation,

Third-Party Plaintiff,

v.

TIMOTHY J. HASSETT, QUENTIN D. PONDER,
JUDSON W. BIBB III, THEODORE H. BANZHAF,
and MARK M. HODOWANEC,

Third-Party Defendants,

and

HPEV, INC., a Nevada corporation,

Nominal Counterdefendant.

**Order GRANTING Motion to
Amend Answer to First Amended
Complaint and Verified Derivative
Counter and Third Party Claim
[Doc. 99]; DENYING Motion to
Dismiss Nominal Counterdefendant
[Doc. 50] and Emergency Motion for
Hearing [Doc. 113] as Moot; and
DENYING Motion to Supplement
Opposition [Doc. 116]**

This is a multi-faceted dispute regarding the corporate governance of Plaintiff HPEV, Inc. The primary dispute concerns the adoption of HPEV board resolutions relating to executive compensation and raising capital through the sale of equity. HPEV, Inc. claims that the resolutions were proper, and Defendant Spirit Bear Limited has taken actions to prevent their implementation.

1 Conversely, Spirit Bear contends that the resolutions were improperly adopted because they violated
2 agreements existing between Spirit Bear and HPEV and that HPEV improperly ousted its appointed
3 directors.

4 Spirit Bear seeks leave to amend¹ its Answer to the First Amended Complaint and Verified
5 Derivative Counter & Third Party Claim² to supplement the factual allegations supporting its
6 derivative claims, assert an additional affirmative defense to HPEV's claims, and add counterclaims
7 for (i) breach of two separate contracts existing between the parties and of HPEV's implied
8 covenants of good faith and fair dealing under those contracts, (ii) conversion, and (iii) declaratory
9 relief. I find this motion appropriate for resolution without oral argument³ and that justice requires
10 allowance of the amendment, and I grant the motion. This disposition affects HPEV's Motion to
11 Dismiss Nominal Counterdefendant HPEV, Inc. and Spirit Bear's Emergency Motion for Hearing,
12 and HPEV's and I deny them both as moot.⁴

13 **Background⁵**

14 On December 14, 2012, Spirit Bear and HPEV entered into a Securities Purchase Agreement
15 (the "SPA"), whereby Spirit Bear acquired 200 preferred shares of HPEV stock along with various
16 warrant rights. The SPA also granted Spirit Bear the right to appoint a certain number of individuals
17 to HPEV's board of directors. The same day, the parties also executed a Registration Rights
18 Agreement (the "RRA") that provided, inter alia, that HPEV would file a Registration Statement
19 with the SEC regarding the securities sold under the SPA. HPEV initially complied with the
20 obligation, filing a Form S-1 Registration Statement for the securities, which the SEC declared
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22 ¹ Doc. 99.

23 ² Doc. 38.

24 ³ L.R. 78-2.

25 ⁴ Docs. 50, 113.

26 ⁵ The factual information contained in this section is offered for context only and is not intended
27 as any finding of fact.

1 effective on January 23, 2013.

2 A dispute arose and the parties entered into a settlement agreement that included an increase
3 in the conversion rate of the preferred stock Spirit Bear held from 20,000 to 50,000 shares, and a
4 new Form S-1 was required to register the shares. But no new Registration Statement was filed.
5 Notwithstanding the settlement agreement, disputes continued between the parties and ultimately
6 culminated in HPEV filing this lawsuit on August 27, 2013. HPEV amended its complaint October
7 9, 2013; Spirit Bear answered and filed a third-party derivative claim.

8 Discussion

9 Spirit Bear seeks to add counterclaims to its pleading based on allegations that HPEV
10 breached its contractual obligations to Spirit Bear after the inception of the lawsuit and after Spirit
11 Bear filed its first responsive pleading. The deadline for amending pleadings (as set in the
12 Scheduling Order) was January 28, 2014.⁶ The instant motion was filed more than four months late
13 on May 5, 2014. Thus, the Court must consider not just whether amendment is appropriate⁷ but
14 whether good cause exists to give Spirit Bear relief from the court-ordered amendment deadline.⁸
15 The “good cause” analysis focuses on “the diligence of the party seeking the amendment,”⁹ who
16 bears¹⁰ the burden of showing that the scheduling deadlines could not have been met even in the
17 exercise of utmost diligence.¹¹ Courts have found “good cause” when the motion to amend is
18 brought shortly after the discovery of previously undisclosed information or a change in underlying

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21 ⁶ Docs. 40, 108.

22 ⁷ *Id.*; see also *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990); *Eldridge v. Block*,
23 832 F.2d 1132, 1135 (9th Cir. 1987) (quotations removed).

24 ⁸ See *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 952 (9th Cir. 2006) (citing
Johnson v. Mammoth Recreations, Inc., 975 F.2d 604 (9th Cir. 1992)).

25 ⁹ *Johnson*, 975 F.2d at 609.

26 ¹⁰ Pun mostly unintended.

27 ¹¹ *Id.*

1 facts.¹²

2 I find good cause for amendment because the request for leave was made shortly after
3 changes in the factual circumstances underlying the claims. First, Spirit Bear's claims under the
4 SPA involve allegations that HPEV directors improperly conducted a shareholder vote amending the
5 company's bylaws to allow for the ouster of the Spirit Bear-appointed directors. Spirit Bear alleges
6 that this plan was set in motion in December of 2013, and HPEV did not inform shareholders that
7 the Spirit Bear-appointed directors had not been re-elected until January 17, 2014—11 days before the
8 deadline to amend pleadings ran. Further, Spirit Bear alleges that HPEV did not inform Spirit Bear
9 of its position that the Spirit Bear-appointed directors did not continue as holdover directors under
10 NRS 78.330(1) until April 14, 2014—21 days before the filing of this motion. The Court agrees with
11 HPEV that Spirit Bear *could* have sought amendment in January after the alleged ouster but, as the
12 situation was evolving, Spirit Bear's delay to May was not due to a lack of diligence on Spirit Bear's
13 part. Consequently, I find good cause under Rule 16(b) to allow Spirit Bear to add the SPA breach
14 claims.

15 Spirit Bear's claims arising under the RRA allege that HPEV failed to maintain a
16 Registration Statement covering the securities sold to Spirit Bear with the SEC as mandated by the
17 RRA; HPEV failed to file a necessary post-effective amendment with the SEC and the Registration
18 Statement became ineffective on May 21, 2013. Spirit Bear alleges it allowed HPEV additional time
19 to cure the breach, but ultimately accepted the additional warrant shares for HPEV's breach pursuant
20 to the RRA in October 2013. HPEV argues that because Spirit Bear knew of the breach as early as
21 May 21, 2013 and at least by October 2013, the amendment could have been brought before the
22 Scheduling Order's deadline. Spirit Bear responds that, at the time of the breach, HPEV stock was
23 trading around \$0.40 per share and it had no intention of selling the stock at that time; so HPEV's
24 breach, which prevented Spirit Bear from selling, did not give rise to any damages. It contends that

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26 ¹² See, e.g., *Pinnacle Fitness & Recreation Mgmt., LLC v. Moyes Family Trust*, No. 08cv1368
27 AJB (BGS), 2011 WL 1565806, *4 (S.D. Cal. Apr. 21, 2011); *Juarez v. Auto Zone Stores, Inc.*, Civil
28 No. 08cv417-L(BLM), 2010 WL 3470759, *2 (S.D. Cal. Sept. 3, 2010).

1 in March, the stock price significantly increased; at this price, Spirit Bear wanted to sell, and
2 attempted to sell its unregistered stock under Rule 144 of the Exchange Act. But HPEV allegedly
3 interfered with, and prevented, Spirit Bear's attempted Rule 144 sale. Thus, although the breach first
4 occurred several months ago, a complete cause of action only recently ripened. Given this recent
5 factual development, I find that there is good cause to allow this late amendment.

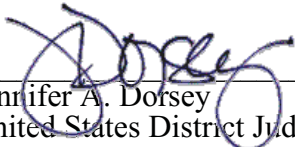
6 Additionally, I find that amendment should be allowed under Rule 15(a). HPEV offers two
7 challenges under Rule 15: (1) it argues that any amendment at this point would unnecessarily expand
8 the scope and length of the litigation, thereby prejudicing HPEV; and (2) HPEV argues that the
9 amendment is futile. Although amendment would expand the litigation, the allegations are based on
10 the continued development of the dispute underlying this case. As the various claims all involve a
11 common nucleus of operative facts, it would be more efficient to try them all together than require
12 Spirit Bear to pursue these new claims and allegations in a separate case. Moreover, there is no
13 evidence that the amendments are sought in bad faith simply to protract litigation, as HPEV
14 suggests. The amendments appear to be based on factual developments related to the main dispute,
15 which occurred after litigation began, so they should be permitted.

16 As to futility, HPEV offers a handful of substantive arguments relating to the interpretation
17 of the contracts, arguing that Spirit Bear's claims will ultimately prove to be meritless. This,
18 however, is not the standard on a motion to amend. Amendment is futile only if, the amended
19 complaint's allegations—taken as true—do not state a plausible claim.¹³ Spirit Bear's proposed
20 amendments state cognizable claims for breach of contract, breach of the covenant of good faith and
21 fair dealing, or alternatively for unjust enrichment and declaratory relief. Although HPEV may
22 dispute Spirit Bear's interpretations of the contracts as the litigation advances, those disputes do not
23 foreclose amendment. Consequently, I grant Spirit Bear's amendment request. For these same
24 reasons, I deny HPEV's motion to supplement its opposition with additional substantive arguments

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26 ¹³ See *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (noting sufficiency of
27 proposed amendment subject to Rule 12(b)(6) test, but applying *Conley's* "no set of facts" standard);
Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556-57 (2007).

1 It is further ORDERED that Plaintiff HPEV, Inc.'s Motion to Supplement Opposition to
2 Motion to Amend/Correct Complaint **[Doc. 116] is DENIED.**

3 DATED June 26, 2014.

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6 Jennifer A. Dorsey
7 United States District Judge
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